also separate and independent, even though the defendant may have the power of discharging them all by making a single payment.

A. L. C.

BOYCOTTS OF "NON-UNION MATERIALS"

In spite of the notion which still lingers in the minds of some judges and lawyers that courts do not "make" law but merely "find" it,[1] the reshaping by judicial legislation of our law governing the relations of capital and labor goes steadily on. An excellent illustration of this is found in the case of *Bossert v. Dhuy* (1917, N. Y.) 117 N. E. 582. It was there held that the members of a carpenters' union have a privilege[2] not only to refuse to work on materials manufactured in non-union shops, but also to send notices of their intention to do so to owners, architects, builders and contractors. More specifically in a suit brought by a manufacturer who employed non-union labor, the court refused to enjoin the officers and agents of the union from: (1) taking steps to compel the members to observe the rules of the union prohibiting them from working on materials made in the plaintiff's shops; (2) sending circulars to the plaintiff's prospective customers requesting them in making contracts to provide for the employment of union men and the use of union-made materials exclusively, with the suggestion that in this way labor troubles would be avoided; (3) inducing workmen in other trades to quit work on any building because non-union men were there employed in installing materials coming from non-union shops.[3]

A careful reading of the opinion (written by Chase, J.) reveals that even yet our judges do not realize fully that in many cases they are in fact legislating. The decision in the principal case purports to be based upon earlier cases, especially that of *National Protective Association v. Cumming*.[4] In that case it was decided that the members of one union are, as respects members of a rival union, privileged to strike or threaten to strike in order to procure the discharge of the members of the rival union and secure a monopoly of the positions

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[1] See the letter of a former Superior Court judge of San Francisco in the New Republic, January 12, 1918, p. 313: "Surely if there are no statutes or precedents in a matter the court must decide the law as the law was some time previously."

[2] *Privilege* is here used in a technical sense, to signify *absence of duty* to refrain from the acts in question. In this sense its correlative is *"no-right"*; its opposite, *duty*. See (1914) 23 YALE LAW JOURNAL, 16, 30.

[3] The opinion emphasizes that "no malice, fraud, violence, coercion, intimidation, or defamation" was used in carrying out the plans of the union, and that the union did not single plaintiff out for the purpose of injuring him, or call upon the public generally to boycott the plaintiff's materials and cease dealing with the plaintiff.

[4] (1902) 170 N. Y., 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648.

for themselves. Such a situation is of course somewhat like that in the principal case and the decision is therefore useful as an aid in reaching a conclusion. The learned justice who wrote the opinion in the instant case, however, seems to think that the decision in the later case may be reached from that in the earlier by the simple process of deductive reasoning. Such a proposition, it is submitted, cannot be successfully maintained. The real problem is whether the similarity of the two situations is so great that the same policy of freedom of action ought to be applied to both. The opinion throughout—whatever may be said of its conclusion—follows chiefly the merely logical, i. e., deductively logical, method of reaching results. It thus fails to recognize that where there is no precedent precisely in point, in the last analysis the court is legislating, and in doing so is legalizing the acts of the union because, on the whole, it believes that the interests of society are better served by permitting the union to carry on "the free struggle for life"[5] in this way. Where the question of policy is discussed in the present opinion it is for the purpose rather of justifying old law rather than of determining what the new rule shall be. Moreover the emphasis is placed by the court too much upon the interests of the members of the union as such and not enough upon that of the community as a whole. Here, as in the other parts of the opinion, the court is merely following the fashion which still prevails in the majority of judicial opinions. Indeed, to find discussions which go to the root of the matter one has to resort largely to the opinions and writings of one judge.[6] It is submitted that too great emphasis can-

[5] "I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests." Holmes, J., dissenting, in *Vegelahn v. Guntner* (1896) 167 Mass. 92, 107, 44 N. E. 1077, 1081.

[6] "Under Necessities of Industrial Livelihood, we come to some of his most distinctive opinions. [*Vegelahn v. Guntner* (1896) 167 Mass. 92, 44 N. E. 1077 (dissenting); *May v. Wood* (1898) 172 Mass. 11, 51 N. E. 191 (dissenting); *Weston v. Barnicoat* (1900) 175 Mass. 454, 56 N. E. 619; *Plant v. Woods* (1900) 176 Mass. 492, 57 N. E. 1011 (dissenting); *Moran v. Dunphy* (1901) 177 Mass. 485, 59 N. E. 125; *Aikens v. Wisconsin* (1904) 195 U. S. 194.] They deserve an essay or a treatise by themselves; for they invoke and expound a whole philosophy of the economic struggle, with careful shaping of particular distinctions for the several typical situations. No man can consider himself to have a respectable conviction on this subject unless he has faced and settled with the dissenting opinion in *Vegelahn v. Guntner*. The only opinions (that I know of) to be even mentioned with it in their breadth of thinking are those of Stevenson, V. C., in *Booth v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 266, and of Baker, J., in *Iron Molders Union v. Allis-Chalmers Co.* (1908, C. C. A. 6th) 166 Fed. 45." . Professor Wigmore, *Justice Holmes and the Law of Torts*, 29 HARV. L. REV. 614.

not be placed upon the desirability of a clearer recognition by our courts of just what they are doing in these cases.[7] If once they see clearly that "the ground of decision really comes down to a proposition of policy of rather a delicate nature,"[8] they will also soon come to recognize the truth of the following: "The danger is that such considerations should have their weight . . . . as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not ensure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society, knowingly seeking to determine its own destinies."[9]

In his opinion the learned justice relied in part upon *dicta* of Mr. Justice Holmes in the case of *Paine Lumber Co. v. Neal.*[10] That was an action to enjoin the national carpenters' union from conspiring to have its members refuse to work on materials made by the plaintiffs in non-union shops in other states, and from enforcing by-laws intended to prevent the members of the union from working on these materials. These acts were claimed to be in restraint of interstate trade and so a violation of the Sherman Anti-Trust Act.[11] It was held (Pitney, McKenna, Van Devanter and McReynolds, JJ., dissenting) that even if this were admitted, the plaintiffs could not succeed, as a private person cannot maintain a suit for an injunction under the section of that act upon which the plaintiffs relied. In delivering the opinion of the court, Mr. Justice Holmes, *inter alia,* said: "As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. *National Protective Asso. v. Cumming,* 170 N. Y. 315. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture or building, since the more successful it is the more competitors are introduced into the trade."[12] In his dissenting opinion Mr. Justice Pitney had no difficulty, on the other hand, in seeing that "The proofs render it clear that defendants are engaged in a boycotting combination in restraint of interstate com-

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[7] See the article by Mr. Justice John E. Young of the New Hampshire Supreme Court, *Law as an Expression of Community Ideals and the Lawmaking Functions of Courts* (1917) 27 YALE LAW JOURNAL 1.

[8] Mr. Justice Holmes, 8 HARV. L. REV. 8.

[9] Mr. Justice Holmes, 8 HARV. L. REV. 9.

[10] (1917) 244 U. S. 459, 37 Sup. Ct. 718.

[11] Act of July 2, 1890, Ch. 642.

[12] 244 U. S. 471, 37 Sup. Ct. 720.

merce prohibited by and actionable under the Sherman Law."[13] It is obvious that the two learned judges are reaching different results chiefly because they have different views as to what constitutes sound economic and social policy.

Especially worthy of note in the principal case is the scope of the privilege given the union. Not only may it call out its own members on strike if non-union men are employed or non-union materials used; it may also induce—by peaceful means, of course—workmen in *other trades* to leave a piece of work because non-union men are employed to install the materials coming from plaintiff's non-union shops. Whether one agrees with this or with the other results reached in the principal case will, naturally, depend upon one's views as to the desirability of allowing opportunity for the development of nation-wide labor unions. The writer of the present comment is convinced that such a development is bound to take place, and that any attempt on the part of our courts to prevent its attainment by peaceful methods similar to those involved in the principal case will in the end prove ineffective. It is of course an open question whether without the aid of the legislature the courts will be able to solve the problem in a manner which, while giving ample opportunity for the development of collective bargaining, will properly protect the interests of all concerned.

W. W. C.

TESTAMENTARY CONTRACTS AND IRREVOCABLE WILLS

Confusion often results from the attempt of a property owner to purchase some valuable thing from another while retaining the benefit of the purchase price until his death, a case where the law seems to permit a person to have his cake and eat it too. Frequently the transaction takes the form of an agreement whereby the promisor, in return for some present consideration given by the promisee, agrees to give the latter by will all the property which he has at his death. Thus the promisor obtains the benefit of the contract while retaining that control over his property which is consistent with the power of testamentary disposition. The confusion results from the attempt to attach to the transaction the characteristics of both a will and a contract. These characteristics are, however, entirely distinct. A contract operates immediately to create a property interest in the promisee; while a will is revocable, or, more properly speaking, inoperative or ambulatory until the death of the testator, at which time it operates to create a property interest in the beneficiary. Or to give the more apposite terminology, the formation of a contract immediately vests in the promisee certain rights, privileges, powers and immunities; while a will does not have a like effect as regards the

[13] 244 U. S. 473, 37 Sup. Ct. 720.